for which the operations were being carried on by the defendants on the land.

"Land" is defined in section 5 of the National Land Code and includes the surface of the earth and all substances forming that surface as well as the earth below the surface and all substances therein.

A Temporary Occupation Licence is granted under section 65 of the National Land Code and can be issued for any purpose other than those prohibited by section 42(2). This makes it quite clear that the State Authority is not competent to grant a Temporary Occupation Licence for purposes of mining. Under section 44(1)(a) of the National Land Code the holder of a Temporary Occupation Licence is entitled to the exclusive use and enjoyment of "so much of the land below the surface as is reasonably necessary to the lawful use and enjoyment of the land." Under section 45(1)(a) he can extract, move or use within the boundaries of the land any rock material in or upon the land but he is not entitled to extract any metal or mineral from any rock material in or on the land or to remove if beyond the boundaries of the land unless he is so authorised under the Mining Enactment.

The Temporary Occupation Licence in question was granted for the purpose of a fish pond. A pond could not be made unless some earth was removed from or dug out of the land. The mere fact that an unconventional means to achieve the object is adopted does not necessarily mean that the means adopted were for an illegal purpose. No such presumption can arise in criminal law unless the statute so provides. Penal statutes have to be fairly construed and faithfully applied according to the intent of the Legislature, taking care that no unwarranted severity is caused on the one hand and no unjustifiable lenity is shown on the other. In case of doubt the practice of the courts always is to lean towards mercy. If the Enactment imposes a penalty for a criminal offence the person against whom it is sought to enforce the penalty is always entitled to the benefit of any doubt which may arise in the construction of the statute. (See *Rumball* v. *Schmidt*[2] and *The London County Council* v. *The Aylesbury Dairy Company, Limited.*[3]) Wright J. in *The London County Council* v. *The Aylesbury Dairy Company, Limited*[3] said:

"... Where there is an enactment which may entail penal consequences, you ought not to do violence to its language in order to bring people within it, but ought rather to take care that no one is brought within it who is not brought within it in express language."

The Judical Committee of the Privy Council in the case of *The Gauntlet*[4] said:

"No doubt all penal Statutes are to be construed strictly, that is to say, the court must see that the thing charged as an offence is within the plain meaning of the words used, and must not strain the words on any notion that there has been a slip, that there has been a *casus omissus*, that the thing is so clearly within the mischief that it must have been intended to be included and would have been included if thought of. On the other hand, the person charged has a right to say that the thing charged, although within the words, is not within the spirit of the enactment."

In the present case the prosecution had failed to prove that the sluicing of the land and the use of monitors was for the purpose of mining. In view of that I am of the opinion that the learned magistrate should not have called upon the defence of the appellants. In any case the defence of the appellants was that they were trying to make a pond by use of the monitors and by sluicing the land. There was nothing illegal in doing that.

The appeal is allowed and the order of the learned magistrate is set aside. The fine, if paid, will be repaid to the appellants.

Appeal allowed.

Solicitors: *Chinn Swee Onn.*

PUBLIC PROSECUTOR v. TAN KIM LIM

[A.Cr.J. (Syed Othman J.) May 21, 1974]
[Johore Bahru — Criminal Appeal No. 35 of 1973]

Excise Act, 1961, ss. 2, 16(1) & 73(1) — "Manufacture" — Importation of second-hand car components and putting them together — Whether "manufacture" of car.

Sharikat Perniagaan Malaysia Barat of Muar had a car in Singapore bearing registration No. SN7257. It obtained an approved permit to import a second-hand body and chassis of a car from Singapore. This was imported into Johore Bahru on August 20, 1971. On August 28, 1971 under the name of the "sharikat" the respondent imported a second-hand diesel engine. For this no permit was required. The body and chassis for customs purposes were valued at $1,500 and the total duty paid on them was $735. The engine was valued at $500 and duty leviable was $200. But the car components were actually parts of SN7257, and if this car had been imported, its value would have been assessed at not less than $10,000 and duty thereon would be 49% of the value. On getting the parts into Johore Bahru, the respondent brought them to a service station and had them assembled. This was done at a charge of $49.10. Subsequently the RIMV Malacca, registered the car as MD2917 in the name of the respondent's wife.

The Customs made investigation and lodged a complaint and consequently the respondent and the manager of the "sharikat" were charged in the Sessions Court with an offence under section 73(1) of the Excise Act, 1961 to the effect that they not being licensed for the purpose were knowingly concerned in manufacturing dutiable good, i.e. a car. The case against the manager of "sharikat" was not proceeded. The learned President held that the respondent had no case to answer and he made the following finding: "The same old engine was put back into the same old chassis etc. in Johore Bahru and new tyres were attached to them.... Besides being given a new registration number and different set of tyres this was the same old car. There has been no transformation into a new thing. This was only putting back together of 2 main parts of an already manufactured old car. I do not think this is manufacturing".

The Public Prosecutor appealed

Held: (1) any conversion or transformation of any article or material into goods which by their nature is dutiable under the Excise Act is manufacturing for the purposes of the Act;

(2) if the goods which are manufactured attract excise duty then there must be a licence for that manufacture. It was not necessary to show that the manufacture should be on a large scale. The test was whether excise duty was leviable on the goods produced;

(3) in this case the process of putting the compenent parts together so as to turn them into a car was the act of manufacturing. Since excise duty was leviable on a car, a licence was required for its manufacture;

(4) on the evidence established by the prosecution the acts of the respondent came within the offence charged, i.e. he was concerned in the manufacture.

Cases referred to:-

(1) *Commissioner of Salt Tax UP* v. *Dr. Sukh Deo* A.I.R. 1969 S.C. 499.

(2) *Prestcold (Central) Ltd.* v. *Minister of Labour* [1969] 1 All E.R. 69.

CRIMINAL APPEAL.

Ahmad Fadzil bin Omar (Federal Counsel) for the appellant.

Keith Sellar for the respondents.

Syed Othman J.: This appeal turns on the meaning of "manufacture" for the purpose of section 16(1) of the Excise Act, 1961. Although section 2 of the Act gives a definition of the word it is of no help here as the legislature there is more interested in liquor and tobacco than in other goods *e.g.* a car which the present case is all about. The definition, with the details excised, reads:

"'manufacture' with its grammatical variations and cognate expressions:

(i) in the case of intoxicating liquors . . . ; and

(ii) in the case of tobacco . . . ."

"Sharikat Perniagaan Malaysia Barat" of Muar had a car in Singapore bearing registration No. SN 7257. It obtained an approved permit to import a second-hand body and chassis of a car from Singapore. This was imported into Johore Bahru on 20th August, 1971 through the agency of a transport company in Johore Bahru. On 28th August, 1971 under the name of the "sharikat" the respondent imported a second-hand diesel engine. For this no permit was required. The body and chassis for customs purposes were valued at $1,500 and the total duty paid on them was $735. The engine was valued at $500 and duty leviable was $200. There was nothing improper in all this. But the body and chassis and the engine were actually parts of SN 7257. If this car had been imported, I understand its value would have been assessed at not less than $10,000 and duty thereon would have been about $4,900 (49% of the value, being the rate of duty at the time). On getting the parts into Johore Bahru, the respondent brought them to a service station and instructed that they be put together. This was done at a charge of $49.10. Wheels and tyres were fixed to the car. On 9th September, 1971 the Registrar & Inspector of Motor Vehicles (RIMV), Melaka, registered the car as MD 2917 in the name of the respondent's wife. The customs department got wind of what the respondent had done. They made enquiries with the Singapore Registrar of Vehicles who told them that his file on SN 7257 had been sent to RIMV Johore on 24th August, 1971. This was after the two component parts had been imported into Johore. There is no doubt MD 2917 was formerly SN 7257. The chassis and engine numbers are the same.

After completing investigation the customs lodged a complaint. Summonses were issued against the respondent and the manager of the "sharikat". They were charged in the Sessions Court Johore Bahru with an offence under section 73(1) of the Excise Act, 1961 to the effect that they not being licensed for the purpose were knowingly concerned in manufacturing dutiable goods *i.e.* a car. Motor vehicles are dutiable at 25% under the Excise Duties Order, 1965 (L.N. 487/65 as amended by P.U.A. 21/70).

At the close of the case for the prosecution it was submitted on behalf of the defence that if anyone was guilty of the offence as charged, it was the "sharikat", but it was not a registered company, (all the indications are that it was partnership); what the respondent did could not amount to the offence as charged, as the evidence against him was that he only brought the parts into the Federation; he only had the car registered in his wife's name; and the actual assembling was done not by him but by mechanics at the service station.

The prosecution agreed that the charge against the manager of the "sharikat" could not stand and did not proceed further against him. But as against the respondent it was submitted that there was a case against him as he was the person who had brought the parts into the Federation; they were assembled here on his instruction, and he did not import a whole car.

The learned president decided that the respondent had no case to answer and acquitted him.

The appeal and arguments in it are mainly focussed on the following finding of the learned president.

"The same old engine was put back into the same old chassis etc. in Johore Bahru and new tyres were attached to them . . . . Besides being given a new registration number and different set of tyres this was the same old car. There has been no transformation into a new thing. This was only putting back together of 2 main parts of an already manufactured old car. I do not think this is manufacturing".

The *Shorter English Oxford Dictionary* gives the maning of "manufacture" as the making of articles by physical labour or machinery, especially on large scale.

To determine what is intended by the word in section 16(1) of the Excise Act, I need only cite here three of the authorities which were discussed by the learned president on the arguments from both sides. These authorities, also cited before me, are from India, America and England.

In *Commissioner of Salt Tax UP* v. *Dr. Sukh Deo*[1] the court at page 561 said: —

". . . The expression 'manufacture' has in ordinary acceptance a wide connotation: it means making of articles or materials commercially different from the basic components, by physical labour or mechanical process. . . ."

The Law Lexicon of British India by P. Ramanantha Iyer quoted a passage from an American judgment which reads as follows: —

". . . Manufacture implies a change, but every change is not manufacture and yet every change of an article is the result of treatment labour and manipulation. But something more is necessary and there must be transformation; a new and different article must emerge having a distinct name, character or use."

In *Prestcold (Central) Ltd.* v. *Minister of Labour*[2] Lord Denning at page 71 paragraph 1 said: —

". . . It seems to me that when a person makes a machine, by getting component parts from elsewhere and assembling them together himself, he can properly be said to be manufacturing that machine."

Considering the authorities, the word "manufacture" appears to me to mean in its general sense the

making by labour or machine of an object or various objects into another object of a different character. Thus if a slab of granite is carved into a grindstone, a piece of wood is made into a piece of furniture, or a lump of earth into a brick, it is manufacture. Similarly, if transistors, condensers, resistors and pieces of wire are put together in a box so as to convert them into a radio or a television set, or if pieces of shaped iron sheets, rubber, glass, fabrics and other materials are assembled and turned into a vehicle it is "manufacture". I do not think it matters whether the parts are derived from their natural state, *e.g.* earth or stone, or man-made *e.g.* condenser, resistor, glass or shaped iron sheets, or whether the parts are old or new, imported or locally produced. The essence of manufacture is the transformation of these parts or basic components into another article of a different character. The origin, nature, condition or age of the parts or basic components, or the condition of the product of the manufacture is not a factor to be taken into consideration in determining the act of manufacture. All this, particularly age, will only affect the value of the products for the purpose of excise duty.

Section 16(1) of the Act so far as applicable to the present case reads: "Subject to the provision of this section, no person shall... manufacture any dutiable goods,.... except under and in accordance with the provisions of a licence...." From this wording I am of the view that any conversion or transformation of any article or material into goods which by their nature is dutiable under the Act is manufacturing for the purpose of the Act. I therefore agree with the submission on behalf of the appellant that if the goods which are manufactured attract excise duty then there must be a licence for their manufacture. I do not think it is necessary to show that the manufacture should be on a large scale. The test is whether excise duty is leviable on the goods produced.

In the present case the parts of a car were imported. These parts became a car when they were put together here, and more so, when wheels and tyres were added to it. No doubt the transformation reverts the parts into what the learned president found to be a car which had existed in Singapore. But when the car was dismantled in Singapore into parts it ceased to exist. They were imported here, not as the car which had existed in Singapore, but as component parts. Each part was a separate entity and could not have functioned by itself as a car. The process of putting them together here so as to turn them into a car I hold is the act of manufacturing. Since excise duty is leviable on a car, a licence is required for its manufacture. The fact the car that was made is considered old in the generally accepted sense of the word will only affect the value of the car for the purpose of excise duty. Old or vintage cars have been known to fetch higher prices than they are really worth.

The next question to be determined is whether the prosecution has made out a case against the respondent as charged. No doubt the respondent did not do the assembling himself. But the evidence shows that he imported the engine after the body and chassis had been imported. In argument a lot of stress has been placed on the fact that he merely instructed that these parts be assembled. But the evidence shows he not only gave the instruction but he also brought the parts to the service station. The mechanics could not have carried out his instruction if he had not supplied them with the materials, and if he had not added wheels and tyres there would have been no running vehicle.

I therefore find that on the evidence established by the prosecution the acts of the respondent came within the offence as charged, *i.e.* he was concerned in the manufacture. I set aside the order of acquittal, remit this case back to the Sessions Court, and direct that the defence be called.

Order accordingly.

Solicitors: *Keith Sellar & Tennakoon.*

LOW WAN KWONG v. LAU KIING TIING

[O.C.J. (Tan Chiaw Thong J.) June 22, 1974]
[Sibu — Matrimonial Cause No. 4 of 1971]

Family Law — Divorce — Foochow custom — Allegation that respondent had left matrimonial home without petitioner's consent or knowledge with intention of never again cohabiting with the petitioner — Desertion — Incompatibility and impossibility despite genuine efforts to live reasonably as husband and wife — Period of two years required — Maintenance of wife and child.

In this case the petitioner applied for an order of dissolution of marriage on the grounds (a) that the respondent had left the matrimonial home without the petitioner's consent or knowledge and with the intention of never again cohabiting with the petitioner; and (b) that the petitioner and the respondent were completely out of sympathy with each other, were incompatible and found it impossible despite genuine efforts to live reasonably together as man and wife.

Held: (1) on the evidence the petitioner had failed to prove that the respondent had deserted him but even if the respondent had been guilty of desertion, the petition was presented prematurely as it was presented less than half a year after the alleged desertion. Where desertion is alleged against a respondent, it has to be for a period of at least two years before a petition can be presented;

(2) on the evidence the petitioner has not proved the second ground alleged against the respondent and in any event the time for which this ground should subsist is two years;

(3) as the respondent in this case was living apart from the petitioner and not without sufficient reason, she was entitled to maintenance for herself and her child.

Cases referred to:-

(1) *Tang Sui Ing* v. *Goh Tiew Liong* [1964] M.L.J. 406.

(2) *Kong Nen Siew* v. *Lim Siew Hong* [1971] 1 M.L.J. 262.

(3) *Sia Wang Yung (f)* v. *Hii Ik Chieng*, Sibu Matrimonial Cause No. 1 of 1967, unreported.

DIVORCE.

Joseph Tang for the petitioner.

Cheng Kwang Li for the respondent.

Tan Chiaw Thong J.: The petitioner is asking for an order of dissolution of marriage against the respondent on two grounds. Firstly, that the respondent had left the matrimonial home at Sg. Narasit, Binatang without the petitioner's consent or knowledge and with